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8 Attorneys for Defendant  
 9 UNITED PARCEL SERVICE, INC., an Ohio  
 corporation, incorrectly sued herein as "United Parcel  
 Service, Inc., a Delaware corporation" and "UPS"  
 10

11 UNITED STATES DISTRICT COURT  
 12 NORTHERN DISTRICT OF CALIFORNIA

13 THOMAS SIMS II on behalf of himself and  
 others similarly situated,  
 14

Plaintiff,

15 vs.  
 16 UNITED PARCEL SERVICE, INC., a  
 Delaware corporation; UPS, a business entity  
 unknown; and DOES 1 to 100, Inclusive,  
 17

Defendants.

Case No.

**DEFENDANT UNITED PARCEL  
SERVICE, INC.'S NOTICE OF  
REMOVAL OF CIVIL ACTION TO  
FEDERAL COURT**

(Alameda Superior Court Case No.  
RG19035659)

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Case No.

88720869.3

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DEFENDANT'S NOTICE OF REMOVAL OF CIVIL  
ACTION TO FEDERAL COURT

## **NOTICE OF REMOVAL**

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA, PLAINTIFF THOMAS SIMS II AND HIS  
ATTORNEYS OF RECORD:

5 PLEASE TAKE NOTICE that Defendant United Parcel Service, Inc., an Ohio  
6 Corporation, (“UPS” or “Defendant”), erroneously named as “United Parcel Service, Inc., a  
7 Delaware corporation” and “UPS, a business entity unknown,” hereby removes this action from  
8 the Superior Court of the State of California for the County of Alameda to the United States  
9 District Court for the Northern District of California. Defendant removes this action pursuant to  
10 28 U.S.C. §§ 1332 (as amended by the Class Action Fairness Act of 2005, Pub. L. 109-2, § 4(a))  
11 and 1441(a) and (b), for the following reasons:

12        1. On or about September 16, 2019, Plaintiff Thomas Sims II filed a Complaint in the  
13 Superior Court of the State of California for the County of Alameda (“Superior Court”) entitled  
14 “*Thomas Sims II on behalf of himself and others similarly situated v. United Parcel Service, Inc.,*  
15 *a Delaware corporation; UPS, a business entity unknown; and DOES 1 through 100, Inclusive,*”  
16 designated as Case No. RG19035659 (the “Action”). A true and correct copy of Plaintiff’s  
17 Complaint in the Action is attached to the Declaration of Jennifer Svanfeldt in Support of  
18 Defendant’s Notice of Removal of Civil Action to Federal Court (“Svanfeldt Decl.”) as Exhibit  
19 A.<sup>1</sup>

20        2. The Complaint contains the following purported causes of action: (a) failure to pay  
21 minimum wage or overtime in violation of California Labor Code §§ 510, 1194, 1197, 1198 and  
22 the Wage Orders (First Cause of Action); (b) failure to provide meal periods in violation of  
23 California Labor Code §§ 226.7, 512, 1198 and the Wage Orders (Second Cause of Action); (c)  
24 failure to provide rest breaks in violation of California Labor Code §§ 226.7, 1198 and the Wage  
25 Orders (Third Cause of Action); (d) failure to provide complete and accurate wage statements in  
26 violation of California Labor Code § 226 (Fourth Cause of Action); and (e) unfair business

<sup>27</sup> <sup>28</sup> <sup>1</sup> In accordance with 28 U.S.C. § 1446(a), the Complaint and all other publicly-available process, pleadings or orders that were served on UPS in this action also are attached to this filing as Exhibit A.

1 practices in violation of California's Unfair Competition Act ("UCL"), Bus. & Prof. Code §17200  
 2 *et seq.* (Fifth Cause of Action). Svanfeldt Decl.; Ex. A.

3       3. On October 16, 2019, Plaintiff effected personal service of the Complaint on  
 4 Defendant's agent for service of process. *See* Svanfeldt Decl. ¶ 4, Ex. B.

5       4. Plaintiff alleges that defendant "UPS" is a "business entity unknown." Compl. ¶ 5.  
 6 However, "UPS" is simply the initials of the Defendant and a commonly used acronym. It is not  
 7 a separate related entity. Plaintiff was employed by United Parcel Service, Inc., an Ohio  
 8 corporation, (also known as "UPS"), not a separate legal entity called "UPS." *See* Declaration of  
 9 Ryan Swift in Support of Defendant United Parcel Service, Inc.'s Notice of Removal of Civil  
 10 Action to Federal Court ("Swift Decl.") ¶ 2.

11       5. United Parcel Service, Inc., a Delaware corporation, is a holding company that is  
 12 incorporated in the State of Delaware with its principal place of business in Atlanta, Georgia.  
 13 Swift Decl. ¶ 6. It has no employees in California and did not employ the Plaintiff. *Id.* Plaintiff  
 14 was employed by United Parcel Service, Inc., an Ohio corporation.<sup>2</sup> Swift Decl. ¶ 2.

15       6. Defendants Does 1 through 100 are unnamed and unknown, and therefore have not  
 16 been served with the Complaint. *See* Compl. ¶ 8.

17       7. In accordance with 28 U.S.C. § 1446(d), the undersigned counsel certifies that a  
 18 copy of this Notice of Removal and all supporting papers will be promptly served on Plaintiff's  
 19 counsel and filed with the Clerk of the Alameda County Superior Court. True and correct copies  
 20 of the Notice to Superior Court of Removal to Federal Court and Notice to Adverse Parties of  
 21 Removal to Federal Court are attached to the Svanfeldt Declaration as Exhibits D and E,  
 22 respectively. Therefore, all procedural requirements under 28 U.S.C. § 1446 have been satisfied.

23       8. This Notice of Removal is timely. It is filed within thirty (30) days of service of  
 24 the Complaint, making this matter removable pursuant to 28 U.S.C. § 1446(b).

25       9. Venue is set in this District pursuant to 28 U.S.C. § 1441(a) because the Superior  
 26 Court where the removed case was pending is located within this District.

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27       <sup>2</sup> To the extent they are deemed separate entities, all named Defendants consent to removal of this  
 28 action to federal court.

1           10. This Action is one over which this Court has original jurisdiction under the  
 2 provisions of 28 U.S.C. § 1332, and may be removed to this Court pursuant to 28 U.S.C.  
 3 § 1441(a) on the following grounds.

4 **REMOVAL BASED ON CLASS ACTION FAIRNESS ACT OF 2005 (28 U.S.C. § 1332(d))**

5           1. This Action is properly removed to this Court under the rules for diversity of  
 6 citizenship jurisdiction under the Class Action Fairness Act of 2005, Pub. L. 109-2, §4(a), 119  
 7 Stat. 9.

8           2. The Class Action Fairness Act of 2005 amended 28 U.S.C. § 1332 to provide that  
 9 a putative class action is removable to federal court if: (1) the proposed class members number at  
 10 least 100; (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs; and  
 11 (c) any member of a class of plaintiffs is a citizen of a state different from that of any defendant.

12          3. Plaintiff's Complaint is pled as a putative class action by which Plaintiff seeks to  
 13 represent "current, former and/or future employees of DEFENDANTS who worked, work, or will  
 14 work for DEFENDANTS as non-exempt hourly employees in California" from September 16,  
 15 2019 to the present.<sup>3</sup> Compl. ¶ 3; *see also* Compl. ¶ 25 ("All current and former non-exempt  
 16 warehouse employees employed in California at any time within the four years prior to the filing  
 17 of the initial complaint in this action"). At this time, there are at least 81,000 individuals who  
 18 were employed in non-exempt hourly inside warehouse positions by UPS in California between  
 19 September 16, 2015 and October 1, 2019 alone. Declaration of John Shipley in Support of  
 20 Defendant United Parcel Service, Inc.'s Notice of Removal of Civil Action to Federal Court  
 21 ("Shipley Decl.") ¶ 3; *see also* Compl. ¶ 3 (as noted above, the Complaint defines the class period  
 22 as "four years prior to the filing of the complaint."). Therefore, the requirement that the proposed  
 23 class consist of at least 100 members is satisfied.

24          4. UPS may properly remove this Action on the basis of diversity of citizenship  
 25 jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because:

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26  
 27          <sup>3</sup> For purposes of this Notice of Removal, UPS considers the relevant time period to be four years  
 28 prior to the date of the filing of the Complaint, September 16, 2019, to the date of the filing of this  
 Notice of Removal. *See Bus. & Prof. Code §17208.*

- 1                   a. Plaintiff Sims is now, and was at the time the Action was commenced, a
- 2                   citizen of the State of California within the meaning of 28 U.S.C. § 1332.
- 3                   *See Compl. ¶ 3 (“At all times mentioned herein, the currently named*
- 4                   *Plaintiff is and was domiciled and a resident and citizen of California”).*
- 5                   b. Plaintiff’s Complaint alleges that he has been employed by UPS in
- 6                   California as non-exempt employee. *See Compl. ¶ 3.*
- 7                   c. At least one currently-employed non-exempt hourly employee in California
- 8                   lists California as his state of residence. *See Shipley Decl. ¶ 3.*
- 9                   d. UPS is now, and was at the time this Action was commenced, a citizen of a
- 10                  state other than California within the meaning of 28 U.S.C. § 1332(c)(1)
- 11                  because UPS is now, and was at the time this Action was commenced, a
- 12                  corporation organized under the laws of the State of Ohio with its principal
- 13                  place of business in the State of Georgia. *See Declaration of Ryan Swift in*
- 14                  Support of Defendant United Parcel Service, Inc.’s Notice of Removal of
- 15                  Civil Action to Federal Court ¶¶ 2-5.
- 16                  e. The presence of Doe defendants has no bearing on diversity with respect to
- 17                  removal. *See 28 U.S.C. § 1441(b) (“[T]he citizenship of defendants sued*
- 18                  *under fictitious names shall be disregarded.”).*
- 19                  f. The presence of a defendant called “UPS a business entity unknown” has
- 20                  no bearing on diversity with respect to removal. “UPS” is the initials of the
- 21                  Defendant, not a separate company.<sup>4</sup> *Swift Decl. ¶ 2.*

22                 5. Without admitting that Plaintiff and/or the purported classes could recover any  
 23 damages, the amount in controversy placed by Plaintiff in this Action, in which Plaintiff asserts a  
 24 maximum four-year liability period, exceeds \$5,000,000, exclusive of interest and costs, based on  
 25 the following:

- 26                 a. Under the removal statute, “[i]n any class action, the claims of the

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27                 <sup>4</sup> Even if a company called “UPS a business entity unknown” existed, it would not be a citizen of  
 28 California. *Swift Decl., ¶ 2.*

1 individual class members shall be aggregated to determine whether the  
 2 matter in controversy exceeds the sum or value of \$5,000,000, exclusive of  
 3 interest and costs.” 28 U.S.C. § 1332(d)(6).

- 4 b. Between September 16, 2015 and October 1, 2019, there were at least  
   5 81,000 individuals employed by UPS in California in non-exempt hourly  
   6 inside positions. *See* Shipley Decl. ¶ 3. Thus, there are at least 81,000  
   7 individuals who fall within the scope of Plaintiff’s alleged class definition  
   8 and are alleged to be the Putative Class Members in this Action.
- 9 c. The average hourly wage rate of individuals holding a non-exempt hourly  
 10 position in California between September 16, 2015 and October 1, 2019  
 11 was approximately \$14.00. *See id.* ¶ 4.
- 12 d. In the Complaint, Plaintiff alleges that UPS failed to pay minimum wage,  
 13 and overtime, failed to provide meal periods, failed to provide rest breaks,  
 14 failed to provide accurate wage statements, and violated the UCL. *See*  
 15 Compl., *passim*. Plaintiff, on behalf of himself and those individuals he  
 16 alleges are similarly situated, seeks to recover unpaid wages and overtime,  
 17 penalties, restitution, and attorneys’ fees against UPS for the four-year  
 18 period preceding the filing of the Complaint, continuing through the date of  
 19 final judgment. *Id.* Based on these allegations, the amount Plaintiff has  
 20 placed in controversy exceeds \$5,000,000, as summarized and explained  
 21 below.<sup>5</sup>
- 22 i. Meal Period Compensation: In the Complaint, Plaintiff alleges that  
 23 UPS “failed to provide Plaintiff and other current and former  
 24 warehouse employees with all meal periods.” *See* Compl. ¶ 15.

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26       <sup>5</sup> UPS discusses below the allegations in Plaintiff’s Complaint that are the subject of this matter  
 27 solely to demonstrate that the amount in controversy in this matter exceeds \$5,000,000. In doing  
 28 so, UPS does not admit that Plaintiff and/or the purported classes he seeks to represent are  
     entitled to any damages or that Plaintiff will be able to recover on any of his theories of liability.

1 Plaintiff further alleges that UPS “failed to pay employees one hour  
2 of pay at their regular rate of pay for each workday Plaintiff and  
3 similarly situated employees did not receive all legally required and  
4 legally compliant meal periods.” Compl. ¶ 16. Under the  
5 California Labor Code, “[i]f an employer fails to provide an  
6 employee a meal period or rest period . . . , the employer shall pay  
7 the employee one additional hour of pay at the employee’s regular  
8 rate of compensation for each work day that the meal or rest period  
9 is not provided.” Cal. Lab. Code § 226.7(c). Because these  
10 payments are deemed to be wages, not penalties, the one-year  
11 statute of limitations applicable to penalties does not apply. See  
12 *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4th 1094, 1114  
13 (2007) (“[W]e hold that the Court of Appeal erred in construing  
14 section 226.7 as a penalty and applying a one-year statute of  
15 limitations. The statute’s plain language, the administrative and  
16 legislative history, and the compensatory purpose of the remedy  
17 compel the conclusion that the ‘additional hour of pay’ [citation] is  
18 a premium wage intended to compensate employees, not a  
19 penalty.”). Thus, Plaintiff and the Putative Class Members may  
20 potentially collect meal period compensation for the entire four-  
21 year liability period specified in the Complaint. As discussed  
22 above, Plaintiff alleges that UPS failed to provide meal periods.  
23 Assuming that Plaintiff and the Putative Class Members each  
24 missed just five meal periods *during the entire liability period*, the  
25 amount in controversy as to Plaintiff’s meal break claims would be  
26 at least \$5,670,000 (5 meal period premiums x \$14.00 per hour x  
27  
28

81,000 Putative Class Members).<sup>6</sup>

ii. **Rest Period Compensation:** In the Complaint, Plaintiff also claims that UPS failed to provide rest breaks to him and other warehouse employees. Compl. ¶ 19. Assuming that Plaintiff and the Putative Class Members each missed just five rest breaks *during the entire liability period*, the amount in controversy as to Plaintiff's rest break claims would be at least \$5,670,000 (5 rest break premiums x \$14.00 per hour x 81,000 Putative Class Members).

9       6.     Accordingly, because proposed class members number at least 100, because there  
10      is diversity of citizenship jurisdiction under the Class Action Fairness Act of 2005, and because  
11      the amount in controversy is met, UPS has satisfied the requirements for removal under 28 U.S.C.  
12      § 1332(d).

13 WHEREFORE, UPS hereby removes the above action now pending before the Superior  
14 Court for the State of California for the County of Alameda to this Court.

15 || DATED: November 15, 2019 GBG LLP

BY: \_\_\_\_\_ /s/ Jennifer Svanfeldt  
JENNIFER SVANFELDT

Attorneys for Defendant  
UNITED PARCEL SERVICE, INC.

26       <sup>6</sup> By estimating the amounts in controversy, UPS does not concede that Plaintiff or the purported  
27 classes he seeks to represent will prevail on any of the claims or that, if Plaintiff prevails, he and  
28 the purported classes he seeks to represent are entitled to damages in any particular amount or at  
all. UPS reserves the full right to dispute Plaintiff's claims with respect to both liability and  
damages.